SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 89

AUTOMATIC CANTEEN COMPANY OF AMERICA,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner Automatic Canteen Company of America prays that a writ of certiorari issue to review the decree of the Court of Appeals for the Seventh Circuit entered in the above entitled cause on March 10, 1952.

OPINIONS BELOW

Although section 2(f), the "buyer liability" provision of the Clayton Act (as amended by the Robinson-Patman Act), was enacted over fifteen years ago, the opinion below is the first judicial examination of its meaning and interpretation. Section 2(f) makes it unlawful for a buyer "knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U. S. C. sec. 13(f). The proper interpretation of these few words when read together with other portions of the act is of great importance to the business life of this country and if wrongly

construed, so as to destroy the normal bargaining process, will have a major inflationary impact on our economy.

The *seller* who grants price differentials is required under the act to justify them by showing corresponding cost savings. This has long been recognized, but no one believed that *buyers* were required to make a similar showing. The court below, by placing precisely the same burden on both buyers and sellers, has created an untenable and impossible situation, that is, one where customers can no longer bargain over prices nor seek or receive lower prices unless they first produce cost justifications from the sellers' books and records.

The opinion of the court of appeals (R. 577) is reported at 194 F. 2d 433. A supplemental opinion denying petition for rehearing and motion for leave to adduce additional evidence was filed on March 3, 1952 (R. 599).

JURISDICTION

The final decree of the court of appeals was entered on March 10, 1952 (R. 602). The jurisdiction of this Court is invoked under Title 28 of the U. S. Code, section 1254(1).

QUESTIONS PRESENTED

1. Whether, in a proceeding against a buyer under section 2(f) of the Robinson-Patman Act, the procedural or *prima facie* provisions of sections 2(a) and 2(b) of said act apply to the buyer, as well as the seller, that is, in such manner as to shift to the buyer the burden of showing the sellers' cost justifications.

2. If so, whether such a construction constitutes a denial of due process in violation of the Fifth Amendment to the Constitution of the United States.[1]

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[1] In the event certiorari is granted additional questions, some of which are briefly discussed herein, will be presented: (1) Whether the court erred in denying petitioner's motion to adduce additional evidence to show

STATUTES INVOLVED

The pertinent provisions of section 2 of the Clayton Act, as amended by the Robinson-Patman Act (Act of June 19, 1936, 46 Stat. 1526, 15 U. S. C. 13), are as follows:

> Sec. 2(a). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale, within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . .
>
> Sec. 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case

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that it was impossible for it to prove the seller's cost justification, (2) whether the court erred in holding that the present record fails to disclose such "impossibility of proof", (3) whether the court erred in granting the cross-petition of the Federal Trade Commission for enforcement, a question on which there is a direct conflict between the Court of Appeals in this case and the Court of Appeals in the Second Circuit in *Ruberoid Co.* v. *Federal Trade Commission*, 191 F. 2d 294 and (4) whether this Court should remand the case for failure of the Commission to consider workable alternative methods of administering section 2(f) of the Robinson-Patman Act.

thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor . . .

Sec. 2(f). That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

STATEMENT OF THE CASE

This petition seeks review of that portion of the judgment of the Court of Appeals for the Seventh Circuit which affirmed an order of the Federal Trade Commission directing petitioner to cease and desist from violating section 2(f) of the Robinson-Patman Act.

Petitioner is engaged in the business of purchasing candy, gum and nuts from the producers thereof and in the resale of these products to its franchise distributors. These Canteen distributors in turn resell the same merchandise to the public by means of vending machines leased from petitioner and located for the most part, in factories and industrial establishments (R. 492-93).

The evidence before the Commission showed that petitioner brought to the attention of its suppliers certain economies created by its methods of doing business and asked them to pass such savings on to petitioner by way of a lower price (R. 369, 403-4). All of the suppliers who were queried on the subject testified there were savings in expense in serving Automatic Canteen Company naming such categories of savings as packaging, freight, selling expense, no free goods, no credit loss, no returns, etc. (R.

49-50, 52, 60-61, 63-64, 76, 79-80, 82, 90, 95, 103, 137, 140-41, 151-53, 156, 185-86, 190, 193, 199-200, 203-04, 210-11, 222, 225, 237-39, 245-48, 254-55, 263, 275, 277, 285, 287).

On these facts the Commission took the view that a prima facie case was made and thereupon found that petitioner knowingly induced and received discriminations in price in violation of 2(f) (R. 511). The Commission said that the mere receipt or inducement of lower prices established a prima facie case against the buyer, that the burden of justifying such differentials on the basis of the *sellers'* differences in cost then shifted to the buyer, i.e., that the provisions of 2(a) and 2(b) relating to prima facie proof apply to the buyer as well as to the seller (R. 519-20).

Petitioner contended that the prima facie provisions of the act apply to sellers only; that they were not meant to apply, and produced an absurd result if applied, in a case against the buyer under 2(f). It contended that if such provisions do apply they amount to a legislative presumption constituting a denial of due process, in that, there is no rational connection between the fact proved, i.e., price differences, and the ultimate facts presumed, viz., differences which actually exceeded the sellers' cost differences and knowledge of such excess on the part of the buyer. Petitioner also contended that the Commission's construction of the statute precluded petitioner from the right to make its defense because it was impossible for a buyer to go forward with cost justification evidence hidden within the reaches of the accounting books and records of 75 to 100 third-party suppliers of candy bars, nuts and chewing gum.

The court of appeals affirmed the order of the Commission saying that when subsections (a), (b) and (f) of section 2 of the act are read together there is "no basis in the

language of the three subsections for a distinction in their scope as between buyers and sellers" and that the act "places precisely the same burden of proving cost justification upon the buyer" as it does upon the seller (R. 577-78).

With respect to due process the opinion of the court of appeals (1) ignored petitioner's argument regarding legislative presumptions, and (2) held it was foreclosed from asserting it was impossible for a buyer to produce the sellers' cost justifications because petitioner had failed to lay a proper evidentiary foundation for such assertion (R. 578-79).

After the decision below affirming the order of the Commission, petitioner filed a petition for rehearing (R. 581) and a motion for leave to adduce additional evidence under section 11 of the Clayton Act. 15 U.S.C. sec. 21 (R. 597). The Court of Appeals denied petitioner's petition and motion on March 3, 1952 (R. 599).

REASONS FOR GRANTING THE WRIT

1. From the standpoint of impact on our competitive system and the number of persons and firms affected, this case presents one of the most important trade regulation cases ever to come before this Court.

This is a case of first impression. It presents a question of statutory construction and a Constitutional issue of due process under the Fifth Amendment of paramount importance in the administration and enforcement of the Robinson-Patman Act. The issue is whether the Federal Trade Commission and the court of appeals were correct in interpreting section 2(f) of the act as placing upon the buyer the burden of proving the sellers' cost justifications for lower prices received by the buyer.

Such an interpretation cuts deeply into the traditional bargaining process between a seller and buyer in every

industry and in very interstate transaction. The Commission's order, affirmed by the court of appeals, confronts every buyer in interstate commerce with the peril that if, for goods of like grade and quality, he accepts a lower price, he must be prepared to prove that the seller's differential price was cost justified.

The serious public importance of this statutory interpretation is shown by the following considerations:

A. IT HAS A DIRECT IMPACT UPON THE HUNDREDS OF THOUSANDS OF BUYERS OF THIS COUNTRY AND EVERY PURCHASING AGENT IN THE UNITED STATES [2]

This petition, in a realistic sense, is a request for a final determination of the grave issue presented herein for the benefit of the whole class of purchasers described above. Apart from what the petitioner has at stake, this case has the widest commercial consequences upon the historic purchasing procedures of the American economy. It is analogous to a "class action" of such comprehensive scope as in itself to reveal a basis for the urgent need of a review by this Court.

The basic issue is whether the American buyer—be he a retailer, wholesaler, or manufacturer—is to be deprived of the time-honored opportunity to bargain over prices. Under the Commission's order subsection (f) would attach to every buyer in interstate commerce,

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[2] According to the 1948 Census of Business there were in the United States 1,769,540 retail stores reporting $130.5 billion in total sales and receipts; personnel totalled more than 9.7 million persons, of whom 7.1 millions were paid employees, 1.7 millions were actively engaged proprietors of unincorporated businesses, and 930,000 were unpaid family members working in retail stores.

Wholesale trade sales for the same year totalled $190.5 billion for 243,366 separate establishments; this segment of our economy provided employment for 2,666,923 persons.

The 1947 Census of Manufacturers shows 240,881 manufacturing establishments with a "value added by manufacture" of $74,425,825,000.

> where the seller is competing with any other seller for respondent's [the buyer's] business or where respondent [the buyer] is competing with other customers of the seller (R. 513).

As stated by the Amicus below, "Seldom has an appeal from a Federal Trade Commission order involved more universal and important business consequences that transcend the interest of any individual respondent in a particular Commission proceeding. . . . It would be difficult to examine any aspect of daily business or trade without finding that the rule the court is here considering would have an immediate and comprehensive impact".[3]

The job of buying is vitally important to the success of any enterprise whether it be a manufacturing establishment, a distributor, a department store, or a corner grocery. Everything manufactured reflects in some measure the fabrication of purchased raw materials and the assembly of purchased components. In the automobile industry, for example, some 78 other industries contribute to automobile manufacture (see Table A).

The Ford Motor Company's total purchases each year are equivalent to a purchase order for $800,000,000 issued to American industry.[4] The assembly of the finished automobile depends on bringing together more than 10,000 parts, procured from more than 7,000 different sources of supply, in the proper quantities and balance, exactly when and where they are needed. It is the responsibility of the purchasing organization to schedule and coordinate this tremendous procurement program.[5]

The industrial purchasing function has been described by one authority as follows:

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[3] Brief of Atlas Supply Co., Amicus Curiae, pp. 1-3.
[4] Purchasing, July, 1948, p. 133.
[5] Ibid, p. 131.

Table A

Industries Contributing to Automobile Manufacture

Raw Materials:

Steel
Textiles
Lumber
Glass
Paint
Oil and Greace
Plastics
Body Insulation
Bonding Material
Anti-Freeze
Gasoline

Partially Completed Components:

Frames
Upholstery
Seat Parts
Windshields
Windows
Lenses
Wiring
Flexible Conduit

Completed Components:

Electrical Goods:
Lights
Instruments
Batteries
Switches
Motors
Generators
Spark Plugs
Relays
Cables
Radios
Distributors
Condensers
Fuses
Resistors
Horns
Clocks

Mechanical:
Carburetors
Clutches
Bumpers
Transmission Shaft
Axles
Mufflers
Air and Gas Cleaners
Springs
Radiators
Fan Belts
Engine Mountings
Gaskets
Wheels
Brakes
Steering Wheels
Locks and Keys
Universal Joints
Bodies
Bearings
Pumps
Windshield Wipers
Heaters
Shock Absorbers
Transmissions
Chains and Sprockets
Keys and Splines
Hydraulic Systems

Miscellaneous:
Tires
Tubes
Carpeting
Rubber Flooring
Brake Lining
Metal Trim
Mirrors
Hub Caps
Ornaments
Nuts and Bolts
Screws
Washers
Cotter Pins
Nails and Tacks
Hose
Pedal Pads

> Purchasing has emerged as a vital and constructive force in management, an essential factor in setting and carrying out company policies, the determining factor in production quotas and accomplishments, the most potent means of achieving economically sound product cost and maintaining a favorable competitive and profit position, a constructive element in public relations, and with economic implications that reach and affect every sector of the national industrial community.[6]

A metropolitan department store in New York, Chicago or Los Angeles buys thousands of separate consumer items for resale, ranging from such durable goods as refrigerators to such fragile objet d'art as fine porcelains and delicate blown glass.

The small business man,—the wholesaler, the retailer, the grocer, the variety store—is in the aggregate the greatest purchaser of all both in number and dollar volume. For hundreds of years he has sought to persuade sellers to reduce prices. This effort to buy cheaply has always been considered beneficial to our economy. It is in fact an essential feature of price competition.

B. THE ECONOMIC EFFECT OF THE DECISION BELOW

The interpretation upon which the Commission's order is based distorts the ancient principle of the Anglo-American common law and our own statutory system that the bargaining process inherently involves a buyer who seeks to buy as cheaply as possible. Section 2(f) of the Robinson-Patman Act limits this freedom of higgling over the price only to the extent of preventing unlawful discrimination resulting from the knowing receipt by a buyer of differential prices which reflect more than cost savings.

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[6] Stuart F. Heinritz, Editor of Purchasing, referring to the purchasing policies of Albert J. Browning, Vice President in charge of Purchasing, Ford Motor Company, July, 1948, p. 97.

On that proposition there is no dispute in this case. What is in controversy is an interpretation of section 2(f) which imputes to the Congress an intention to create for the buyer the hazard that he is inducing and receiving a lower price which he cannot cost justify because the data essential to such justification is in the exclusive possession of the seller who grants the price differential. If the buyer must proceed at his own peril unless he can prove that the seller's lower price is justified by differences in cost, then buyers generally cannot safely continue to bargain in the manner heretofore regarded as the essence of the bargaining process upon which a competitive system depends. The inevitable result for buyers in general would be to seek the legal shelter of a one-price purchase and sale basis as an escape from the legal fiction that the buyer is in as favorable a situation to prove the seller's cost justification as the seller himself.

This reversal of the traditional process of bargaining in commercial transactions presents a substantive and procedural due process issue under the Fifth Amendment. If the Commission and court of appeals are right in imputing to Congress an intention to place upon competition the clog that would necessarily result from requiring a buyer to prove the seller's cost justification, then this Court should decide whether or not such Congressional intention is consistent with due process or denies due process because of the drastic effects it would have in precluding buyers generally from the very hard bargaining which the hard competition of the private enterprise system demands.

2. The decision by the court below that the Robinson-Patman Act requires a buyer to prove his seller's cost justification presents a question as to the proper construction of section 2(f) which is of major importance in the administration of the act and which has not been but should be settled by this Court.

The court below erroneously held that section 2(f) places precisely the same burden upon the buyer, as it places on the seller, to prove cost justification once the Commission establishes knowing inducement or receipt of a price difference. Accordingly, this case presents the major legal question of whether in a proceeding against a buyer under 2(f) of the Robinson-Patman Act, the procedural or prima facie provisions of sections 2(a) and 2(b) of said act apply to the buyer as well as the seller, that is, in such manner as to shift to the buyer the burden of showing the sellers' cost justifications.

A. THE QUESTION IS OF MAJOR IMPORTANCE TO THE ADMINISTRATION OF THE ACT.

It seems obvious that the "buyer liability" subsection cannot be administered with any degree of certainty until the Supreme Court has finally ruled upon the interpretation of its provisions. If the Commission had lost below it could have advanced this reason for review with compelling conviction. It is no less valid when asserted by petitioner on behalf of all buyers who are necessarily affected by the decision of the court below.

A similar situation was recently presented to this Court in *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231. As in the present case, the Commission issued a cease-and-desist order against respondent and the order of the Commission was upheld by the court of appeals.

This Court, however, "granted certiorari on petition of the company because the case presents an important issue under the Robinson-Patman Act which has not been settled by this Court."

In the present case, the court below held in effect, citing the *Morton Salt* case (334 U. S. 37), that since the statute places the burden of proof as to cost justification on the seller, it necessarily follows that "precisely the same burden" rests on the buyer (R. 577-78). Such a mechanistic rationale is patently unsound; it applies a principle of law, reasoned and sound under one set of circumstances, to an entirely different set of circumstances without analysis as to the application of the rule in the latter situation. The result is unfair and oppressive, not only to the parties involved, but to all buyers and all future litigants under 2(f).

With buyers and sellers placed in the same procedural situation, it is only reasonable to assume that in the future, in order to avoid difficult and lengthy litigations arising in seller cases where cost justifications can be made, the Commission may resort to the easier method of proceeding primarily against buyers. As successive buyers are subjected to cease and desist orders like the one in this case, and as still others attempt to bring their policies into line with such orders, price competition on the basis of increased efficiency in distribution will disappear.

In its place will be a rigid price structure foreign to the philosophy of our competitive system and also contrary to the real philosophy of the Robinson-Patman Act which was designed to preserve lower prices based on more efficient means of manufacture and distribution.

This result is reached because the Commission's decision forecloses the petitioner from receiving admitted cost savings. The evidence in this case established one fact

beyond all doubt—sellers realized *some* savings in cost in selling to petitioner. However, as a practical matter, the order forbids any differential based on such cost savings inasmuch as it is physically and economically impossible for petitioner, the buyer, to present evidence as to the seller's cost differences. The result is that petitioner cannot safely accept a lower price on any transaction if that price is known by petitioner to be lower than the price to another even though it is clear that sellers enjoy lower costs of manufacture, service, and delivery with respect to petitioner's purchases. This means that petitioner and the thousands of buyers affected by this decision must buy only at the highest price of any seller.

Thus, although the Robinson-Patman Act was designed to promote competition, not to shackle it, the result of the commission's order and the opinion of the court below will be to weaken competition by making it impossible for buyers to accept price differences that are entirely legitimate because of undeniable cost savings.

B. THE CONSTRUCTION OF SECTION 2(f) APPROVED BY THE COURT BELOW REQUIRING A BUYER TO PROVE HIS SELLER'S COST JUSTIFICATION IS CLEARLY ERRONEOUS.

1). *Sections 2(a) and 2(f) prohibit placing on the buyer the burden of proving a seller's cost justification.*

Section 2(f) makes it unlawful for buyers "knowingly to induce or receive a discrimination in price *which is prohibited by this section*" (emphasis supplied). This is the only prohibition in the section; there are no provisos or exceptions. Since 2(a) is the only subsection of section 2 which makes it unlawful for a seller "to discriminate in price," the phrase in 2(f) "discrimination in price which is prohibited by this section" necessarily refers to the one prohibited by 2(a).

Section 2(a) contains a general prohibition against price discrimination by a *seller*, followed by a proviso stating that cost justified differentials are not unlawful. This in turn is followed by section 2(b) which provides that the burden of showing justification shall shift to the alleged violator upon proof of a prima facie case of discrimination. Concededly, in a proceeding against a seller under 2(a), the seller has the burden of proof to show that he comes within this proviso.

But the present case involves a *buyer, not a seller*. What the buyer is prohibited from "knowingly" inducing or receiving by 2(f) is a price differential which he knows makes more than "due allowance" for differences in the seller's cost of manufacture, sale, or delivery; for not until this is shown does the differential become a "discrimination in price which is prohibited by this section".

To interpret 2(f) otherwise would require a complete rewriting of the section to incorporate within it provisos operating as affirmative defenses. The provisos of section 2(a) specifically apply to sellers only. Any attempt to incorporate in 2(f) by judicial interpretation the provisos of 2(a) is not only contrary to the express language of section 2(f) but produces the absurd result of placing on the buyer the impossible task of proving the seller's cost justification. The mere fact that section 2(a) places the burden of proof on the seller with respect to certain exemptions does not *ipso facto* place upon the buyer in a 2(f) proceeding a similar burden. Had Congress meant to do so, it could easily have added exemptions or provisos to 2(f) specifically applicable to the buyer.

2). *Application of 2(b) is limited to sellers.*

A major prop in the reasoning of the Commission and the court below is section 2(b) of the act which provides that the burden of showing cost justification shall shift to

"the person charged" with a violation of the section. We agree that section 2(b) is important. Indeed, since the procedural provisions of 2(b) deal specifically with the question of burden of proof and were, as the Commission states, inserted for the sole purpose of establishing rules as to "burden of proof", that section is controlling. Analysis of 2(b) shows unmistakably that it applies only to sellers and that the court below was in error in holding that it applies also to the buyer.

Such procedural devices as that set forth in 2(b) for shifting the burden of proof originate in and draw their reasoned strength from elementary common law principles. In upholding these provisions as applied to the *seller*, the courts have pointed out that he is the one who "sets two prices", "knows why he has done so", and "possesses all the data as to costs".[7]

The Congressional sponsors intended section 2(b) to apply to the seller alone. They said:

> Where the information is peculiarly within the knowledge of the party the burden shifts to him.[8]
>
> Where for any reason, the evidence to prove a fact is chiefly, if not entirely within the control of the party . . . then the burden of going forward rests on him.[9]

The legislative history makes it clear that Congress intended in section 2(b) to do no more than make the common law principles as to burden of proof applicable to proceedings before the Federal Trade Commission. Thus, Congressman Patman declared that "the matter of burden of proof" is "a restatement of existing law". 80 Cong. Rec. p. 8442. See also Utterback, 80 Cong. Rec. p. 9418; Gilchrist, 80 Cong. Rec. p. 8452; Ekwall, 80 Cong. Rec. p. 8328. The "law of this land" which Congressman Patman said

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[7] *Moss, Inc.* v. *F.T.C.* (C.A.2), 148 F. 2d 378, 379; *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, 60.

[8] 80 Cong. Rec. p. 8328.

[9] 80 Cong. Rec. p. 8452.

section 2(b) was intended to write into the act has never placed such an unfair and oppressive burden of proof on a defendant as the burden which the court below foists upon petitioner in ruling that the buyer must undertake the burden of proving the cost justifications of his various sellers.

Obviously, the buyer has no knowledge of the facts concerning the seller's cost justification in his possession nor does he have them within his control. Inherently, buyers and sellers are at opposite poles—they bargain at arm's length. If anyone knows whether or not a price granted is unlawful, it is the seller.

The court below ignored this clear Congressional intent to apply section 2(b) to the seller alone. The court apparently took the position that the words of the statute are plain and require no recourse to the legislative history for clarification. The fallacy of this approach where the Robinson-Patman Act is concerned is readily apparent.[10] This Court has found it appropriate to resort to the legislative history in deciding the various Robinson-Patman Act cases which have come before it. See, e. g., *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, at footnote 14. Legislative history was extensively relied upon by the Court in the recent case of *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384.

In the present case, the Court is dealing with a statute which is "inescapably ambiguous" (in the words of Mr. Justice Jackson, concurring with Mr. Justice Minton in the *Schwegmann* case) and the legislative history makes it plain that Congress intended only to restate the existing

[10] See, e.g., *Ruberoid Co.* v. *Federal Trade Commission* (C.A. 2) 189 F. 2d 893, 894: "We sympathize with the petitioner's position and can realize the difficulties of conducting business under such general prohibitions. Nevertheless we are convinced that the cause of the trouble is the Act itself, which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." See also Lindley, J. in *United States* v. *New York Great A. & P. Tea Co.*, 67 F. Supp. 626, 677 (E. D. Ill. 1946): "I doubt if any judge would

law of the land as to burden of proof and not to enact such an unusual, and unprecedented, procedural requirement as the one that a buyer who accepts a lower price from a seller does so in peril of being required at a later date to justify the seller's cost data—data which is necessarily in the possession of the seller, not the buyer.

In the *Morton Salt Company* case (334 U.S. 37, 44-45) this Court said that the burden of proof was on the seller because the cost justification proviso of 2(a) was a special exception and because 2(b) "specifically imposes the burden of showing justification on one who is shown to have discriminated in prices". Only a seller can discriminate in price. Mr. Justice Jackson, although dissenting, concurred in the Court's holding regarding the seller's burden of proof. "I agree," he said, "that these facts warrant a prima facie inference of discrimination unless the company [the seller] which best knows why and how these discounts are arrived at and which possesses all the data as to cost, comes forward with the justification." 334 U.S. 37, 60.

We submit that the fundamental rules of fair procedure which place on the party who knows the facts the burden of going forward with the evidence, as developed by the courts and restated by Congress in 2(b), govern this case and require this Court to reject the construction of 2(f) by the court below.

3). *The court below rewrote section 2(f) in a manner at variance with the Congressional intent.*

The court below, in order to reach the result it did, was required to rewrite 2(f) in several particulars. It eliminated the phrase "prohibited by this section"; it read into 2(f) the cost justification proviso of 2(a) and the prima

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assert that he knows exactly what does or does not amount to violation of the Robinson-Patman Act in any and all instances." Cf. *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 F. 2d 786 (C.A. 7, 1951).

facie provisions of 2(b); and it interpreted the word "knowingly" to mean merely that the buyer knew he was getting a lower price.

This makes a vastly different statute from the one Congress wrote. A mere price differential was not "prohibited" by Congress,[11] nor was a lower price which can be cost justified.

In the same manner the court's interpretation of the word "knowingly" clearly violates the intention of Congress—in fact, it leaves the word without any meaning whatever. A buyer who obtains a lower price based on published quantity discounts or on the basis, as in this case, that he saves the seller distribution expense, knows automatically that he is receiving a lower price. As Congress used it, the word "knowingly" means knowledge of receipt of a "prohibited" price, that is, "knowledge of the facts which, taken together, constitute the failure to comply with the statute". *St. Joseph Stockyards Co.* v. *U. S.*, 187 Fed. 104, 105.

The court below construed section 2(b) as applying to a case under 2(f) on the ground that 2(b) states that the burden of rebutting a prima facie case shall be "upon the person charged with violation" (R. 578). This construction disregards several factors.

In the first place, the "person" referred to must be one charged with "discrimination in price" under 2(a) or discrimination in "services or facilities" furnished under 2(e), i.e., the seller. It necessarily follows, as stated by the Third Circuit in *Great Atlantic & Pacific Tea Co.* v. *F.T.C.*, 106 F. 2d 667, 677, that the language of 2(b) "relates to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but [is] not applicable to pro-

[11] *Bruce's Juices* v. *Amer. Can Co.*, 330 U.S. 743, 745-46:

"The act does not prohibit all quantity discounts. . . . Congress refused to declare flatly that they are illegal."

ceedings instituted under paragraphs (c) or (d)". Such a conclusion is required since subsections (c) and (d), like subsection (f), cover prohibitions not mentioned in 2(b). No more than 2(b) applies to 2(c) and 2(d) does it apply to 2(f). In this respect, the decision of the court below which held that 2(b) does apply to 2(f) is in conflict with the reasoning of the Third Circuit in *Great Atlantic & Pac. Tea Co.* v. *F.T.C.*, supra.

Secondly, the meeting competition proviso of 2(b) states "nothing herein contained shall prevent a *seller* rebutting the *prima facie* case *thus made* by showing. . . ." (emphasis supplied). Clearly, the phrase "prima facie case thus made" refers back to the identical phrase contained in the first part of 2(b) with reference to the shifting of the burden of proof. By referring specifically in the meeting competition proviso to "a seller", Congress intended that the first part of 2(b) as well as the second part should be applicable to sellers only. The omission of any reference to the buyer or to a prohibition against him in contrast to the specific reference to a seller and to seller prohibitions enforces the affirmative inference that that which was omitted must have been "intended to have opposite and contrary treatment".[12]

Thirdly, 2(b) authorizes the Commission to issue an order "terminating the discrimination". The buyer does not have it within his power to terminate the granting of a price discrimination because he is not the grantor in the first place. The buyer can only terminate "knowingly" inducing or receiving discriminations.

Finally, the non-application of 2(b) to a case under 2(f) is demonstrated by the chronological history of legis-

[12] No better illustration of the rule of expressio unius est alterius exclusio could be found. *See Ford* v. *U. S.*, 273 U.S. 593, 611; 2 Sutherland (3d ed. Horack), Statutory Construction (1943), pp. 412-414.

lative events. Section 2(b) originated in the House and the House bill did not contain a buyer proscription.[13] In fact section 2(f) appeared in neither the House nor the Senate bills as they were reported from committee but first appeared as a floor amendment to the Senate bill.[14] The House bill never contained an equivalent of this subsection but in conference the House agreed to accept it.[15]

3. The construction adopted by the court below raises serious constitutional questions.

A. IT DENIES DUE PROCESS BECAUSE THERE IS NO RATIONAL CONNECTION BETWEEN THE PROVEN FACT OF PRICE DIFFERENCES AND THE PRESUMPTION THAT SUCH DIFFERENTIALS WERE (a) UNLAWFUL, AND (b) THAT PETITIONER KNEW THIS FACT.

Statutes like the Robinson-Patman Act creating artificial presumptions of fact and making one fact prima facie evidence of another, are by no means new or even modern. Where they are reasonable and where there is a rational connection between the fact proved and the ultimate fact presumed, they have long been recognized and enforced by the courts.

On the other hand where they are unreasonable and arbitrary the courts have been quick to strike them down.[16]

The function of such statutes has been said to be "to make it possible to convict where proof of guilt is lacking". *Pollock* v. *Williams*, 322 U. S. 4. In fact, of recent years

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[13] H.R. 8442; H. Rep. 2287, 74th Cong. 2d Sess.

[14] 80 Cong. Rec. p. 6428.

[15] H. Rep. No. 2951, 74th Cong. 2d Sess. p. 8.

[16] *Tot* v. *United States*, 319 U.S. 463; *State* v. *Kelly* (1944), 218 Minn. 247, 162 ALR 477, 15 N.W. (2d) 554; *Great Atlantic & Pac. Tea Co.* v. *Ervin*, 23 F. Supp. 70; *Morrison* v. *California*, 291 U.S. 82; *McFarland* v. *Amer. Sugar Ref. Co.*, 241 U.S. 79; *Western & A. R. Co.* v. *Henderson*, 279 U.S. 639; *Manley* v. *Georgia*, 279 U.S. 1; *Bailey* v. *Alabama*, 219 U.S. 219.

there has been such a marked increase in the creation of this statutory device as to suggest not only a design to minimize the labor of investigators and prosecutors but a trend—supported by some judicial dictum that there are no vested rights in rules of evidence—to consider the rights of individuals as secondary to the demands of society.[17]

Statutes of this nature are of two general types: those creating conclusive presumptions of law or fact; and those creating rebuttable presumptions or "prima facie" proof such as section 2(b) of the Robinson-Patman Act as applied to a seller. Those of the first type have met the almost uniform fate of being declared unconstitutional, as denying due process of law.[18] Those of the second type have met a varying fate, some withstanding and others succumbing to attacks on diverse grounds. It would be redundant to undertake a complete review and analysis of the decisions passing upon the validity of such statutes in view of the many exhaustive opinions and commentaries which can be consulted for that purpose.[19]

The test of rational connection in testing *prima facie* proof was first enunciated by this Court in 1910 in the case of *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35. Since then it has been applied many times, with varying results, in criminal as well as civil cases. The latest pronouncement on the subject is *Tot* v. *United States*, 319 U. S. 463. This decision laid down the clearest and best enunciation of the test of rational connection we have had so far and there can be but slight doubt that it will be quoted as the model formulation of the rule in many later cases just

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[17] See Brosman, The Statutory Presumption, 5 Tulane L. Rev. 178; Chamberlain, Presumptions as First Aid to the District Attorney, 14 ABA Jour. 287; O'Toole, Artificial Presumptions in the Criminal Law, 11 St. John's L. Rev. 167.

[18] See 20 Am. Jr., Evidence, sec. 10.

[19] These are collected in annotations at 162 ALR 495, 86 ALR 179 and 51 ALR 1139.

as the *Turnipseed* case has been quoted in countless cases during the last 35 years.

The Court in the *Tot* case had under consideration the validity of section 2(f) of the Federal Firearms Act, 15 U. S. C. sec. 902(f), which provided: "It shall be unlawful for any person who has been convicted of a crime of violence or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate commerce, and the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by any such person in violation of this Act".

The Government's evidence was limited to proof of Tot's prior conviction on an assault and battery charge, his plea to a burglary charge, and that in 1938 he was found in possession of a loaded automatic pistol.

The question up for decision was the power of Congress to create the presumption that "From the prisoner's prior conviction of a crime of violence and his present possession of a firearm or ammunition, it shall be presumed (1) that the article was received by him in interstate or foreign commerce, and (2) that such receipt occurred subsequent to July 30, 1938, the effective date of the statute". 319 U. S. at 466.

In sustaining the contention that the statute failed to meet the tests of due process Mr. Justice Roberts, speaking for a unanimous court, said:

> The rules of evidence are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States. The section under consideration is such legislation. But the due process clauses of the Fifth and Fourteenth Amendments set limits upon the power of Congress or that of a state legislature to make the proof of one fact or group of

> facts evidence of the existence of the ultimate fact on which guilt is predicated. . . . The government seeks to argue that there are two alternative tests of the validity of a presumption created by statute. The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of the opinion that these are not independent tests but that the first is controlling and the second but a corollary. Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of a lack of connection between the two in common experience.

Obviously there is no rational connection in the instant case between the fact proved (price differences) and the facts presumed by the Commission and the court below, namely, price discrimination in *excess* of the sellers' cost differences and *knowledge thereof* on the part of the buyer.

B. TO PLACE THE BURDEN OF COST JUSTIFICATION UPON A BUYER CREATES A CONCLUSIVE PRESUMPTION OF FACT IN VIOLATION OF THE DUE PROCESS CLAUSE.

Presumptions cannot operate against one who has neither possession nor control of the facts presumed. *Westland Oil Co.* v. *Firestone Tire and Rubber Co.*, 143 F. 2d 326; *Lynch* v. *Ninemire Packing Co.*, 63 Wash. 423, 115 P. 838, L. R. A. 1917E 178; *Clark* v. *Detroit & M. Ry. Co.*, 197 Mich. 489, 163 N. W. 964, L. R. A. 1917F 851.

While the test of comparative convenience of producing evidence was rejected as an independent test in the *Tot* case, it has been the subject of considerable discussion. 162 A. L. R. at p. 511. It has been applied only (a) where the defendant has more convenient access to the proof, and

(b) where requiring him to go forward with such proof will not subject him to unfairness or hardship.

In the *Turnipseed* case the Court, after stating that the validity of a legislative presumption depends on a rational connection between the fact proved and the ultimate fact presumed, said (219 U. S. 35):

> So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude a party from the right to present his defense to the main fact presumed.

The foregoing quotation is directly in point. If the attempt made here to apply the prima facie provision of the act to the buyer is sustained and the main facts are presumed, namely, that the differentials (1) were in excess of the savings, and (2) petitioner knew it, petitioner could make no defense because it has no access to the books and records of its 75 to 100 suppliers.

A statute compelling a party to produce proof not in his possession or control is surely subject to constitutional attack. However, the court below refused to pass on this important question, saying that petitioner had "laid no foundation for its assertion . . . that cost justification was impossible of proof by a buyer", citing *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 352-53, and *Tennessee Consolidated Coal Co.* v. *Comm.*, 117 F. 2d 452. These cases are not in point. There the petitioner was in full *possession* of all the facts but refused to put them in evidence.

We think the court of appeals erred in holding that the record failed to disclose the "impossibility of proof". The Commission introduced records and summaries of records covering a ten year period showing the prices at which more than 75 manufacturers sold their candy, gum and nuts to petitioner (R. 515). To meet this, petitioner, the buyer, would be required to make cost justifications for 750 years

(10 years X 75 suppliers) from the books and records of companies not parties to the litigation and against whom petitioner has no power of compulsory subpoena or process. The Court should take judicial notice of the fact that such a feat is impossible; it is common knowledge, moreover, that cost accounting is far from an exact science, that to establish a cost justification which in fact exists takes much more than mere access by a buyer to the seller's books and records—it takes the active cooperation of the seller in making time studies, estimates, allocations of cost and interpretation of records.[20]

"Detailed cost figures are among the most confidential of completely financial data, and the idea of submitting them to audit by the customer is contrary to all accepted rules of good business practice". Purchasing 361, Prentice Hall 1947.

C. SINCE THE COURT BELOW REFUSED, ON WHOLLY TECHNICAL AND PROCEDURAL GROUNDS, TO EXAMINE THE CONSTITUTIONAL QUESTION, A CASE OF WIDE APPLICATION WAS DECIDED WITHOUT CONSIDERATION OF IMPORTANT AND POSSIBLY DETERMINATIVE ISSUES.

Petitioner sought to adduce additional evidence to show that it was impossible for it to prove the sellers' cost justifications (R. 597). On a narrow legal technicality that this offer of evidence had not been made in due time, the court below denied petitioner's motion (R. 599). It held that the present record failed to show such "impossibility" of proof, while simultaneously denying the petitioner the right to enlarge the record to deal with the question.

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[20] The courts will take judicial notice of facts which are well and universally known without particular proof being adduced in regard to them, and also with reference to those dealings of the commercial world which are of like notoriety. *Schollenberger v. Pennsylvania*, 171 U.S. 1. See also *Minnesota v. Barber*, 136 U.S. 313, 321; *Phillips v. Detroit*, 111 U.S. 604, 606.

At the very least, even if the Commission's interpretation of the statute should be sustained by this Court, the substance of due process requires this Court to recognize that foreclosure of proof that it is impossible for a buyer to show a seller's cost justification makes historic business relationships between sellers and buyers in every industry depend for their legality upon a highly technical choice *in limine* by a defendant of a statutory construction which even the courts may find extremely difficult to decide in the search for the frequently elusive Congressional intent. Without admitting that the record failed to disclose the very impossibility of proof which petitioner put in issue before the Commission and in the reviewing court below, it is nevertheless clear that there was an unconscionable denial of due process by reason of the failure to remand the case to the Commission for a full determination of this question.

It is undeniable that the word "discrimination" cannot be a talismanic word of illegal conduct by a mechanical and literal interpretation. The Commission and the courts have recognized in every Robinson-Patman Act proceeding that the term "discrimination" is *not* synonomous with a price differential.

Inequality is the essence of discrimination. As Mr. Justice Frankfurter pointed out in a different factual situation, but nevertheless by way of a situation applicable to this case, "The Procrustean bed is not a symbol of equality. It is no less inequality to have equality among unequals". *New York* v. *United States*, 331 U. S. 284, 352.

The bargaining process historically has recognized that unequals arise by reason of savings resulting from economy and efficiency imputable to the method or the quantity by which some purchasers buy as against less efficient and less economical methods by which other purchasers buy or take delivery. In this case, the Commission and the court

of appeals arbitrarily assumed that such differences must be cost justified by the buyer. In so ruling, both tribunals assumed that this is the one and only interpretation which conforms to the Congressional intent. The petitioner asks that this Court review this substantial federal question of widespread public importance to ascertain whether such an interpretation denies petitioner substantive due process in the absence of record evidence that the Commission weighed alternative interpretations consistent with the objectives of the legislation but without doing violence to long-established usages of a bargaining relationship concerning prices.

If the ruling of the court of appeals remains in effect, then the petitioner and all buyers similarly situated will be faced with a peril of being held in violation of the act *per se* whenever they knowingly accept prices lower than those of their competitors.

CONCLUSION

This case may seem to present the bare procedural question as to whether the burden of justification shifts to the buyer after the Commission has shown "knowing" receipt of a lower price. Technically that is the legal question posed by the case, but its answer raises broad substantive problems with major commercial, social and consumer implications.

The whole history and pattern of purchasing—whether the purchaser be the housewife, the lawyer buying office furniture, the small merchant acquiring goods in the market place, the relatively small interstate concern such as petitioner, or the very large manufacturing or distributing concern—demonstrate that all seek a lower price. The commercial buyer often advances reasons why he should receive a more attractive price—that is his job, and his whole training and competitive experience. Surely our

trading system has not become so stagnant by virtue of the Robinson-Patman Act that the buyer must now say to the seller: "Are your prices too low?—Be sure now not to give me too good a price". That is precisely what the views of the Federal Trade Commission add up to in this case.

If the United States is to follow the road of certain other countries where the merchant is literally just a shopkeeper or a mere "stockist", with no virility in buying or selling, then Congress should say so in unmistakable statutory language. Certainly it turned no such sharp corner in its enactment of section 2(f) which was a Senate floor amendment adopted without debate or other serious legislative consideration.

For the above reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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